Supreme Court, U.S.
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No. 90-1980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TOWERS WORLD AIRWAYS INC.,
THE TOWERS ORGANIZATION, INC. and
TOWERS FINANCIAL CORPORATION,

Petitioners,

vs.

PHH AVIATION SYSTEMS, INC. and
PHH GROUP, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Where a cardholder voluntarily entrusts its credit card to its agent and fails to notify the issuer of the risk of potential unauthorized use of the card, is that cardholder's liability limited under the Truth-In-Lending Act?

2. Assuming, *arguendo*, that the credit card issuer had notice of the agent's limited authority, should the cardholder be held liable for charges which exceeded the agent's authority where the third party merchant involved was unaware of the agent's limited authority?

STATEMENT PURSUANT TO RULE 29.1 OF THE UNITED STATES SUPREME COURT

Petitioner PHH Aviation Systems, Inc. is a wholly owned subsidiary of PHH Holdings Corporation which is, in turn, a wholly owned subsidiary of PHH Corporation. On or about August 22, 1988, the name of PHH Group, Inc. was changed to PHH Corporation. PHH Holdings Corporation owns a number of other corporations engaged in various activities throughout the world which have no relationship with PHH Aviation Systems, Inc. other than their common ownership by PHH Holdings Corporation. PHH Corporation will provide a list of such entities, if requested.

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PHH Aviation Systems, Inc. and PHH Group, Inc. (collectively "PHH") submit this brief in opposition to the petition of Towers World Airways, Inc., The Towers Organization and Towers Financial Corporation (collectively "Towers") for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

COUNTERSTATEMENT OF FACTS

Although petitioners' brief seeks to characterize this case as a critical Truth-In-Lending Act precedent, this characterization is misleading. Quite simply, this case arises from a commercial dispute, wherein a corporation seeks to avoid paying $89,025.87 charged to its corporate charge card by its agent to whom it voluntarily entrusted its card.

In February 1988, PHH Aviation Systems ("AvSystems") issued a credit card for the purchase of aviation fuel and other goods and services (the "PHH Credit Card") to Towers Airways and Towers Financial Corporation ("TFC"). (Petitioners' Appendix ("App.") at 3a.) Pursuant to the instruction of an officer of Towers Airways, the PHH Credit Card was delivered to World Jet Corporation ("World Jet"), the company responsible for the management of the aircraft that TFC had leased for its use (the "Aircraft"). (App. at 13a.) Upon receiving the PHH Credit Card, World Jet presented it to Fred Jay Schley, who had been designated as chief pilot for the aircraft by Steven Hoffenberg, Chairman of the Board and President of TFC. (App. at 13a.)

From mid-February to mid-August 1988, purchases totalling $265,806.65 were made on the card by Schley and other pilots of the Aircraft for the benefit of the Aircraft; payments totalling $176,780.78 were received with respect to these purchases. These payments were made pursuant to detailed weekly billing statements which were provided to TFC by AvSystems. In all, these payments covered 92 separate PHH Credit Card transactions which were detailed on 15 weekly AvSystems billing statements dated March 9, 1988 through June 22, 1988. Although due demand was made on several occasions for the balance due of $89,025.87, that amount was never paid by petitioners.

On or about August 12, 1988, after making several demands for payment, AvSystems cancelled the PHH Credit Card and closed petitioners' account. Later, by letter dated August 24, 1988, petitioners first notified AvSystems in writing of an alleged misuse of the PHH Credit Card. Shortly thereafter, in September 1988, petitioners initiated legal proceedings against AvSystems and PHH Group, Inc.

Towers filed a complaint in the New York state court seeking a declaratory judgment (i) absolving it of liability for any charges incurred in connection with fuel purchases for chartered flights for individuals unconnected with TFC, (ii) holding PHH responsible for knowingly permitting these purchases and consequently for breaching the credit agreement issued in connection with the PHH Credit Card, and (iii) requiring an accounting and disgorgement of all improperly charged amounts. After removing to federal court, PHH moved for summary judgment on its counterclaims seeking recovery of the $89,025.97 in unpaid charges. (App. at 3a.)

The District Court granted PHH's motion, denied Towers' prayer for declaratory relief, and entered judgment for the full amount in dispute. District Judge Kevin T. Duffy held Towers liable under the terms of the credit agreement between Towers and PHH, which provided that "[t]he Aircraft Operator shall be responsible for all purchases made with a Card from the date of its issuance until the Aircraft Operator reports that a card is lost, stolen, misplaced or cancelled by calling PHH." Judge Duffy further held that the Truth-In-Lending Act, which limits cardholder's liability for "unauthorized" uses, was inapplicable to charges incurred by one to whom the cardholder has "voluntarily and knowingly allow[ed]" access for another, limited purpose. (App. at 4a.)

Towers appealed the District Court's decision, conceding liability under its credit agreement with PHH but contending that summary judgment was improperly granted on the issue of whether the chief pilot's use of the card to incur charges totalling $89,025.87 in connection with chartered flights was "unauthorized" within the meaning of the Truth-In-Lending Act. (App. at 4a.) On May 17, 1991, the United States Court of Appeals for the Second Circuit affirmed the District Court's holding that the disputed charges were not unauthorized within the meaning of 15 U.S.C. §§ 1602(o) and 1643(a)(1) because, under the facts of this case, the chief pilot in possession of the PHH credit card had apparent authority to use the PHH credit card for all purchases. (App. at 8a-9a.)

REASONS FOR DENYING THE WRIT

Petitioners have failed to identify any conflict among the circuits or any conflict between the Second Circuit's opinion herein and *any* State Court of last resort. In addition, despite petitioners' claim to the contrary, the Second Circuit has not carved out a "major exception" to the $50 statutory limit to cardholder liability set forth in the Truth-In-Lending Act, 15 U.S.C. §1601 et seq. (1988) To the contrary, the Second Circuit explicitly held that under the facts of this case the Truth-In-Lending Act "provides no guidance as to uses arising from the voluntary transfer of credit cards" and resolved the issue of Towers' liability based upon principles of agency law. (App. at 7a.) In support of this resolution, the Second Circuit observed that:

> [b]y defining 'unauthorized use' as that lacking in 'actual, implied or apparent authority,' Congress apparently contemplated, and courts have accepted, primary reliance on background principles of agency law in determining the liability of cardholders for charges incurred by third-party card bearers. (Citation omitted) (App. at 5a.)

Petitioners advance four separate reasons why their petition for a writ of certiorari should be granted. These reasons are not only insufficient to warrant this Court's granting a writ of certiorari but they are also misleading in that they assume facts not established below.

A. *The Court of Appeals' Decision Does Not Decide An Important Question of Federal Law and Will Not Adversely Affect A Wide Array of Consumer Interests*

U.S. Sup. Ct. R. 10.1(c) provides that a writ of certiorari may be granted where an "important question of federal law," not previously decided by this Court has been decided by a U.S. Court of Appeals. Importance in this context is measured in terms of importance to the general public, and frequently involves issues of constitutional dimensions. *Rice v. Sioux City Memorial Park Cemetery Inc.*, 349 U.S. 70, 74 (1955). Clearly,

this case does not rise to such a level of importance. Despite petitioners' attempt to magnify the precedential value of this case, it must be viewed as what it is — a case arising from a commercial dispute. Limited to its facts, as indeed it must be, this case stands for the simple proposition that where a cardholder voluntarily entrusts its credit card to an agent and where there is no objective evidence of any limitation upon that agent's authority to use the credit card, the cardholder is responsible for charges made to the card.

The Second Circuit itself recognized the limited application of its holding in this case and wrote:

> Though we agree that a cardholder, in lending or giving his card for one purpose, acts in a way that significantly contributes to the appearance of authority, at least as perceived by the third-party merchant, to make other purchases, we need not decide whether voluntary relinquishment for one purpose creates in every case apparent authority to incur other charges. In the pending case, the appearance of authority for Schley to purchase fuel on chartered flights was established not only by Towers' consent to Schley's unrestricted access to the PHH card but by other conduct and circumstances as well. (App. at 8a.)

The Second Circuit then proceeded to examine the facts which led them to conclude that apparent authority was not limited in this case:

> Nothing about the PHH card or the circumstances surrounding the purchases gave fuel sellers reason to distinguish the clearly authorized fuel purchases made in connection with non-charter flights from the purchases for chartered flights. It was the industry custom to entrust credit cards used to make airplane-related purchases to the pilot of the plane. By designating Schley as the pilot and subsequently giving him the card, Towers thereby imbued him with more apparent

> authority than might arise from voluntary relinquishment of a credit card in other contexts. In addition, with Towers' blessing Schley had used the card, which was inscribed with the registration number of the Gulfstream jet, to purchase fuel on non-charter flights for the same plane. The only difference between these uses expressly authorized and those now claimed to be unauthorized – the identity of the passengers – was insufficient to provide notice to those who sold the fuel that Schley lacked authority for the charter flight purchases. (App. at 8a-9a.)

The Second Circuit's fact specific decision doesn't affect the consumers right to limit their liability *vis a vis* cards voluntarily entrusted to a third-party by simply cancelling the card in question. The Second Circuit deliberately left open the possibility that the apparent authority created by voluntary credit card entrustment might be terminated by subsequent conduct.

Petitioner contends that "the congressional policy of limiting consumer liability for unauthorized use is particularly important to separated and divorced spouses." (Petitioner's Brief at 15). The Second Circuit recognized this and specifically observed:

> Even where the card issuer also requires return of the card prior to cancellation of the agreement, a cardholder who has tried and failed to recover a card from an 'estranged spouse, a dishonest employee or a disappeared "friend," ' (citation omitted), likely can prevail on a claim that the card user has stolen the card and that any subsequent charges are for that reason unauthorized. (App. at 2a.)

While the issue of unauthorized use of credit cards by estranged spouses may need to be explored in greater depth, this case, which has no factual connection to the issue, is not the vehicle for such exploration.

B. *The Allegedly Conflicting Precedents Cited By Petitioners Represent Neither The Opinions of Conflicting Circuit Courts Nor State Courts of Last Resort, Thus A Writ of Certiorari Is Not Appropriate*

As clearly set forth in U.S. Sup. Ct. R. 10, certiorari is "not a matter of right, but of judicial discretion," and "will be granted only where there are special and important reasons therefor." *See also* 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 4004, at 507 (1977).

In their brief, petitioners point to the purported conflict between the Second Circuit's May 17, 1991 decision herein and (i) Federal Reserve Board Regulation Z (12 C.F.R. §226.12 ("Regulation Z")); (ii) a Federal Trade Commission ("FTC") consent order; (iii) an Ohio *municipal court* decision and (iv) a Louisiana *Court of Appeal* decision. Since neither the Ohio municipal court nor the Court of Appeal of Louisiana is a state court of last resort, *none* of these "conflicting decisions" represent a decision otherwise final in the absence of Supreme Court review. The Second Circuit's decision thus has raised no conflict which warrants this Court's granting certiorari. *See* U.S. Sup. Ct. R. 10.1(b), 28 U.S.C.A.

The holding in the Louisiana case cited by petitioners, *Cities Serv. Co. v. Pailet*, 452 So. 2d 319 (La. Ct. App. 4th Cir. 1984), is, in fact, not in conflict with the decision by the Second Circuit herein. Although the Louisiana Court of Appeal held that the cardholder was not liable for charges made to his card after the issuer had received notice of possible unauthorized use of the card, it also held that the cardholder was liable for charges made to the card before such notice was given to the issuer. Accordingly, based upon Judge Duffy's finding that notice was not given to PHH until August 1988, *Cities Service* actually supports the Second Circuit's finding that Towers is liable for the charges in question.

C. *The Record Does Not Establish That Notice Was Given To PHH By Towers That Unauthorized Use of the PHH Credit Card By An Agent Might Occur*

In framing its Question Presented, Towers assumes a fact not established in the instant case — i.e. that notice of unauthorized use was given to PHH prior to its alleged misuse.

In his Endorsement Order, Judge Kevin T. Duffy explicitly observed that "(the) unauthorized use was brought to light in August, 1988, well after (the agent) charged significant amounts on the PHH Credit Card." (App. at 15a.)

Based upon these facts, the decision below simply does not conflict with Regulation Z or *Matter of Shell Oil Co.*, 95 F.T.C. 357 (1980), the FTC consent decree which required that a card issuer limit the liability of a cardholder to $50 after receiving notice that the authorized use of the card by a third-party user had been revoked. Similarly, the state court decisions cited by petitioners, *Cities Serv. Co. v. Pailet*, 452 So.2d 319 (La. Ct. App. 4th Cir. 1984) and *Standard Oil Co. v. Steele*, 22 Ohio Misc. 2d 27, 489 N.E.2d 842 (Mun. Ct. Akron Co. 1985) have no applicability to this case.

In short, not only have petitioners failed to demonstrate that a conflict exists among the Circuits or that an important federal question has been raised below, but they have also made an erroneous assumption of a critical fact. There simply is no basis for a grant of certiorari in this case.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

July 25, 1991

Respectfully submitted,

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